A **MALAYSIAN MOTOR INSURANCE POOL**

v.

NAZA MOTOR TRADING SDN BHD

B FEDERAL COURT, PUTRAJAYA
ARIFIN ZAKARIA CJ
ZULKEFLI MAKINUDIN CJ (MALAYA)
JAMES FOONG FCJ
[CIVIL APPEAL NO: 02(f)-14-2010(W)]
C 19 OCTOBER 2011

INSURANCE: *Motor insurance - Construction of policy - Interpretation of - Loss of motorcar - Car stolen while being test driven by potential buyer - Whether events leading to loss of motorcar constituted theft or*
D *cheating - Whether insurer could rely on exclusion clause to deny liability under the insurance policy - Penal Code, ss. 378 & 415*

INSURANCE: *Motor insurance - Loss of motorcar - Car stolen while being test driven by potential buyer - Whether events leading to loss of*
E *motorcar constituted theft or cheating - Whether insurer could rely on exclusion clause to deny liability under the insurance policy - Penal Code, ss. 378 & 415*

This was an appeal by the appellant/defendant against the decision of the Court of Appeal in allowing the respondent's/plaintiff's
F appeal against the decision of the High Court in dismissing the plaintiff's claim for a sum of RM263,779.34 against the defendant. The defendant had issued an insurance policy known as Motor Trade Policy ('the policy') to indemnify the plaintiff in respect of loss or damage to motor vehicles arising from, *inter alia*, theft.
G During the currency of the said policy, the plaintiff's vehicle, a Mercedes Benz E230 ('the motorcar'), was stolen by a customer who had represented himself as one Dato' Ahmad Rosli Bachik ('the customer'). In the course of test driving the motorcar, the customer had requested the plaintiff's sales representative who had
H accompanied the customer to buy fried chicken from a Kentucky outlet. Upon his return, the sales representative had discovered that the motorcar and the customer had disappeared. The plaintiff's claim for loss of the motorcar under the policy was allowed by the Court of Appeal since it was due to theft. The
I defendant contended herein that the loss of the motorcar was

caused by way of cheating under cl. 8 of the exclusion clause in the policy which excluded any claim for cheating. The question for which leave to appeal to this court was granted was: in interpreting a policy of insurance to determine if a given event is covered under the policy, what are the rules of interpretation in these circumstances, *ie*, (i) when the coverage agreement (theft covered) and the exclusion clause (cheating excluded) were both applicable, whether the event (loss of motor vehicle) was covered and did the *contra proferrantum* rule of construction apply and (ii) when the exclusion clause (cheating excluded) applied, whether cheating must be that of the insured plaintiff.

Held (dismissing the appeal with costs)
Per Zulkefli Makinudin CJ (Malaya) delivering the judgment of the court:

(1) Based on the factual circumstances of the case, the loss of the motorcar was a result of theft and it did not fall within the definition of any other specified offence under the exception clauses of the insurance policy. Besides, this case could not fit any of the explanations or illustrations as envisaged by s. 415 of the Penal Code to fall under the offence of cheating. The said customer had dishonestly taken away the motorcar without the consent of the plaintiff's sales representative. The consent, if at all given by the plaintiff, was not an unqualified one and was not for a false representation by the said customer. Even if there was any element of deceit by the said customer, it was just to facilitate the commission of the act of theft. (paras 12, 14 & 16)

(2) An exception clause was not operative unless if the events leading to the loss of the motor vehicle could be regarded as the proximate cause of the loss or the inevitable cause of the loss. There was not a single element to show that the plaintiff's sales representative was deliberately courting danger. He was deceived into leaving the car with a view to oblige the said customer as a potential buyer. No reasonable man would have foreseen that such a potential buyer who had portrayed himself as a man of some standing in society would have acted in the same manner. Thus, the plaintiff had not acted recklessly. There was nothing in the insurance policy that the act of negligence on the part of the insured was provided as an exclusion clause to defeat the claim made by the insured. (paras 15 & 19)

(3) The court ought not to interpret the clauses of the insurance policy which would result in the insured losing the benefits of the coverage what it appears to have granted under the coverage clause by applying the exclusion clause to exclude liability. Thus, the exclusion clause in relation to the offence of cheating did not apply. (para 20)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan perayu/defendan terhadap keputusan Mahkamah Rayuan dalam membenarkan rayuan responden/plaintif terhadap keputusan Mahkamah Tinggi dalam menolak tuntutan plaintif bagi jumlah RM263,779.34 terhadap defendan. Defendan telah mengeluarkan polisi insuran yang dikenali sebagai Polisi Motor Trade ('polisi') bagi menggantirugi plaintif terhadap kehilangan atau kerosakan kepada kenderaan bermotor yang berpunca daripada, antara lain, pencurian. Semasa polisi tersebut berjalan, kenderaan plaintif, satu Mercedes Benz E230 ('motokar') telah dicuri oleh seorang pelanggan yang telah merepresentasi dirinya sebagai Dato' Ahmad Rosli Bachik ('pelanggan'). Semasa menguji pandu motokar, pelanggan tersebut telah meminta jurujual plaintif yang telah menemani pelanggan tersebut, untuk membeli ayam goreng dari restoran KFC. Apabila jurujual plaintif kembali, beliau telah mendapati bahwa motokar tersebut dan pelanggan telah hilang. Tuntutan plaintif untuk kehilangan motokar di bawah polisi tersebut telah dibenarkan oleh Mahakamah Rayuan kerana ia disebabkan oleh pencurian. Defendan telah berhujah di sini bahawa kehilangan motokar adalah disebabkan oleh penipuan di bawah fasal 8 bagi fasal pengecualian di dalam polisi yang mengecualikan sebarang tuntutan bagi penipuan. Isu untuk ditentukan adalah sama ada kejadian-kejadian menuju kepada kehilangan motokar merupakan pencurian atau penipuan. Soalan di mana kebenaran merayu di mahkamah ini telah dibenarkan adalah: dalam mentafsirkan polisi insuran bagi menentukan sama ada sesuatu kejadian dilindungi di bawah polisi, apakah kaedah-kaedah pentafsiran di dalam keadaan-keadaan berikut, iaitu, (i) apabila perjanjian perlindungan (kecurian dilindungi) dan klausa pengecualian (penipuan dikecualikan) digunapakai bersama, sama ada kejadian (kehilangan kenderaan bermotor) dilindungi dan adakah kaedah *contra proferrantum* untuk pentafsiran digunapakai dan (ii) apabila klausa pengecualian (penipuan dikecualikan) digunapakai, sama ada penipuan itu semestinya daripada plaintif yang telah diinsuranskan.

Diputuskan (menolak rayuan dengan kos)
Oleh Zulkefli Makinudin KHN menyampaikan penghakiman mahkamah:

(1) Berdasarkan fakta kes, kehilangan motokar adalah disebabkan oleh pencurian dan ianya tidak terjatuh dalam apa-apa definisi kesalahan lain yang dinyatakan di bawah dasar fasal pengecualian polisi insuran. Lagipun, kes ini tidak boleh dikaitkan dengan mana-mana penjelasan atau ilustrasi seperti yang terkandung dalam s. 415 Kanun Keseksaan untuk jatuh di bawah kesalahan penipuan. Pelanggan tersebut secara tidak jujur telah mengambil motokar tanpa persetujuan jurujual plaintif. Persetujuan, jika pun diberikan oleh plaintif, adalah tanpa syarat dan bukannya representasi palsu oleh pelanggan tersebut. Walau pun adanya unsur penipuan oleh pelanggan tersebut, ianya hanya untuk memudahkan kecurian.

(2) Dasar fasal pengecualian tidak beroperatif kecuali jika kejadian-kejadian yang membawa kepada kehilangan kenderaan motor boleh dianggap sebagai penyebab terdekat kehilangan atau sebab yang tidak dapat dielakkan. Tiada sebarang unsur yang telah menunjukkan bahawa jurujual plaintif memikat bahaya dengan sengaja. Beliau telah terpedaya dalam meninggalkan kereta dengan pandangan untuk memuaskan pembeli berpotensi itu. Tiada sesiapa yang munasabah dapat melihat bahawa pembeli berpotensi, yang telah menggambarkan dirinya sebagai seorang yang dihormati oleh masyarakat, akan berkelakuan seperti itu. Oleh itu, plaintif tidak berkelakuan tanpa berhati-hati. Tiada apa-apa yang dinyatakan di dalam polisi insuran bahawa kelakuan cuai pihak yang diinsuranskan telah disediakan sebagai fasal pengecualian bagi menentang tuntutan yang dibuat oleh pihak yang diinsuranskan itu.

(3) Mahkamah tidak sepatutnya mentafsirkan fasal-fasal polisi insuran yang akan menyebabkan pihak yang diinsuranskan kehilangan faedah-faedah liputan, apa yang sepatutnya diberikan di bawah fasal liputan, dengan menggunakan fasal pengecualian bagi mengecualikan liabiliti. Oleh itu, fasal pengecualian yang berkenaan dengan kesalahan penipuan tidak terpakai.

Case(s) referred to:
Hong Leong Assurance Berhad v. Teoh Seow Chiew [2004] 8 CLJ 247 HC ***(refd)***
Lake v. Simmons [1927] AC 487 HL ***(refd)***
Reischer v. Borwick [1894] 2 LR 548 ***(refd)***
Taisho Marine and Fire Insurance (M) Sdn Bhd v. Secure Guards Sdn Bhd [2000] 1 LNS 142 HC ***(refd)***

Legislation referred to:
Penal Code, ss. 378, 415

Other source(s) referred to:
Malcolm A Clarke, *The Law of Insurance Contracts*, 4th edn 2002, para 19-1C2, p 583
Ratanlal & Dhirajlal, *Indian Penal Code*, 31st edn, p 2022

For the appellant - Nathan Maharajah (Ian Pereira with him); M/s Lawrence Pereira & Partners
For the respondent - Sagadaven Thangavelu (N Navinderan with him); M/s Shearn Delamore & Co

[Editor's note: For the Court of Appeal judgment, please see Naza Motor Trading Sdn Bhd v. Malaysian Motor Insurance Pool [2011] 1 CLJ 332.]

Reported by Kumitha Abdul Majid

JUDGMENT

Zulkefli Makinudin CJ (Malaya):

[1] This is an appeal by the appellant against the decision of the Court of Appeal in allowing the respondent's appeal against the decision of the High Court in dismissing the respondent's claim for a sum of RM263,779.34 against the appellant under a policy of insurance issued by the appellant to the respondent.

[2] Before the High Court the appellant was the defendant and the respondent was the plaintiff. We shall refer the parties herein as they were before the High Court.

[3] The question for which leave to appeal to this court was granted is as follows:

> In interpreting a policy of insurance to determine if a given event is covered under the policy, what are the rules of interpretation in the following circumstances:

(a) When the Coverage Agreement (Section 1 – theft is covered) and the Exclusion Clause (Exception 8 – cheating is excluded) are both applicable. Is the event (loss of the motor vehicle) covered?

(b) When the Coverage Agreement (Section 1 – theft is covered) and the Exclusion Clause (Exception 8 – cheating is excluded) are both applicable. Does the contra proferrantum rule of construction apply?

(c) When the Exclusion Clause (Exception 8 – cheating is excluded) applies, must cheating be that of the insured (Respondent)?"

[4] The relevant facts of the case which can be discerned from the statement of agreed facts of both parties before the High Court are as follows:

(1) Pursuant to an application by way of a proposal form dated 11 August 1998 and in consideration of the premiums paid by the plaintiff, the defendant had issued a policy of insurance known as Motor Trade Policy (Road Risk) to the plaintiff for the period 23 August 1998 to 22 August 1999 ("the policy").

(2) Pursuant to s. 1 of the policy, the defendant had agreed to provide cover and to indemnify the plaintiff in respect of loss or damage to the motor vehicles arising from, *inter alia*, by fire, external explosion, self-ignition or lightning or burglary house breaking or theft.

(3) On or about 20 November 1998 during the currency of the policy the plaintiff's vehicle bearing Registration No. W1180A model Mercedes Benz E230 ("the motorcar") was stolen by a third party representing himself as one Dato' Ahmad Rosli Bachik ("the said customer").

(4) The said customer had visited the plaintiff's showroom situated at No. 129, Jalan Raja Muda Abdul Aziz, Kg. Baru, 50300 Kuala Lumpur and indicated his intention to purchase a new motorcar model Mercedes Benz. The said customer was attended to by one Encik Ariffin bin Majid ("the plaintiff's sales representative").

(5) The said customer had requested to test drive the motorcar and was accompanied by the plaintiff's sales representative during the test drive.

(6) Whilst in the course of test driving the motorcar the said customer had received a telephone call *via* his mobile phone. Subsequently, he stopped the said motorcar along Batu 5, Jalan Gombak, Kuala Lumpur and requested the plaintiff's sales representative to buy fried chicken from a Kentucky outlet.

(7) The plaintiff's sales representative went to buy the fried chicken and upon his return, he discovered that both the said customer and the motorcar had disappeared.

(8) At all material times, the said customer had misrepresented himself as Dato' Ahmad Rosli Bachik and that he had wanted to buy the motorcar.

(9) The plaintiff's sales representative had lodged a police report on 20 November 1998.

(10) The plaintiff had intimated a claim under the said policy for the sum of RM263,779.34.

(11) The defendant has repudiated liability under the said policy on the ground that the motorcar was stolen by way of cheating under General Exception No. 8 of the said policy.

[5] The insurance policy in question was produced and marked as documentary exhibit P3 before the High Court. The relevant part in respect of coverage under the policy relied upon by the plaintiff is as in cl. 1 of Section I – Loss or Damage, which reads as follows:

Section I – Loss or Damage

1. The Pool will indemnify the Insured against loss of or damage to the Motor Vehicle and its accessories and spare parts whilst thereon:

   (a) by accidental collision or overturning or collision or overturning consequent upon mechanical breakdown or consequent upon wear and tear.

   (b) by fire external explosion self-ignition or lighting or burglary housebreaking or theft.

The relevant part of the policy that was relied upon by the defendant to exclude itself from liability is under cl. 8 of the General Exceptions, which reads as follows:

> 8. Any loss or damage caused by or attributed to the act of cheating by any person within the meaning of the definition of the offence of cheating set out in the Penal Code. Cheating is defined in the Penal Code as whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to 'cheat'.

[6] The learned judge of the High Court dismissed the plaintiff's claim on the grounds that the loss of the motorcar was caused by cheating under the General Exception cl. 8 of the policy and the negligence of the plaintiff itself in failing to take reasonable steps to safeguard the motorcar from the loss. The Court of Appeal allowed the plaintiff's appeal against the decision of the High Court and reversed the judgment of the High Court. The Court of Appeal held that the loss was due to theft.

[7] Learned counsel for the defendant submitted before us that the loss does not fall within the definition of theft in the Penal Code and as such is not within the ambit of the coverage of the policy. It is contended by the defendant that if it is held that the loss falls within the definition of theft the claim is only payable if none of the Exclusion Clauses apply. It is the defendant's case that cl. 8 of the Exclusion Clause of the policy applies and it excludes any claim for cheating. The defendant further contended that even if the court finds that the loss was due to theft within the definition of theft in the Penal Code and the court finds that the loss also comes within the definition of cheating in the Penal Code, then the plaintiff's claim must still be dismissed because under the rules of construction of insurance policy terms and conditions if a claim falls within one of the exceptions, then it is not payable.

[8] Notwithstanding the above contention of the defendant, we are of the view based on the statement of agreed facts and the relevant clauses of the insurance policy (exh. P3) the only issue for determination in this case is whether the events leading to the loss of the motorcar constituted theft or cheating. If it is theft, the defendant shall be liable, but if it is cheating, the defendant shall not be liable. It is to be noted that the Court of Appeal in its judgment did not make a finding that under the Coverage Clause of the policy where theft is covered and under the Exclusion Clause (Exception 8) where cheating is excluded are both applicable to the facts of the case.

[9] It is observed that the term "theft" in cl. 1 of Section I of the policy does not expressly stipulate any definition, whereas the term "cheating" in the Exclusion Clause 8 expressly stipulates that the term is as defined under the Penal Code. On this point we endorsed the view expressed by the Court of Appeal in this case that since the liability or repudiation of liability hinges upon the commission of criminal offences, namely either theft or cheating, it is reasonable to visualize the facts within the scope or definitions under the Penal Code.

[10] Section 378 defines theft as "Whoever, intending to take dishonestly any movable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft."

The above definition in the Penal Code is followed by a few explanations and illustrations. Explanation 5 reads as follows:

> The consent mentioned in the definition may be expressed or implied, and may be given either by the person in possession, or by any person having for that purpose authority either express or implied.

[11] On the other hand, cheating as defined under s. 415 of the Penal Code, reads as follows:

> Cheating
>
> 415. Whoever by deceiving any person, whether or not such deception was the sole or main inducement:
>
> (a) fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or

(b) intentionally induces the person so deceived to do or omit to do anything which he would not do or omit to do if he were not so deceived and which act or omission causes or is likely to cause damage or harm to any person in body, mind, reputation or property,

is said to 'cheat'.

As with the definition of theft under s. 378, the definition of cheating under s. 415 is followed by a few Explanations and Illustrations.

[12] We agree with the finding of the Court of Appeal that the loss of the motorcar was a result of the theft and not cheating. The said customer had dishonestly taken away the motorcar without the consent of the plaintiff's sales representative. Although the said customer was given possession of the motorcar, it was only for a specific limited purpose, namely to test-drive accompanied by the plaintiff's sales representative. The consent if at all given by the plaintiff was not an unqualified one and was not for a false representation by the said customer. On this point we would refer to a passage from the *Indian Penal Code* by Ratanlal & Dhirajlal (31st edn at p. 2022 which states as follows:

> The thing stolen must have been taken without the consent of the person in possession of it … But consent given under improper circumstances will be of no avail (*vide* ill. (c)). Consent obtained by a false representation which leads to a misconception of facts will not be a valid consent.

[13] We could not agree with the contention of the defendant that if the court finds the loss was due to theft as well as the loss could also be attributed to cheating then the plaintiff's claim would still not succeed. We find that the facts of the case could not fit with any of the Explanations or Illustrations as envisaged by s. 415 of the Penal Code to fall under the offence of cheating.

[14] It is our considered view based on the facts of the present case even if there is any element of deceit by the said customer it was just to facilitate the commission of the act of theft. On this point, it is appropriate to quote what Lord Atkinson said in *Lake v. Simmons* [1927] AC 487 HL, at p. 511, which reads as follows:

> I think Miss Esme Ellison obtained the possession of the jewellery handed to her by the appellant by an operation which is appropriately described as larceny by a trick. That, when she got possession of it, she feloniously appropriated it, is not disputed. But the operation of entrusting the possession of the jewellery but not the property in it to her, which *prima facie*, would mean handing it over to her to be devoted by her to some legitimate purpose, was treated rather as if it were something separable from, and unconnected with, the theft committed. It really was nothing of the kind. The theft was a composite thing. It consisted first of the false representation the woman made to the appellant, which he apparently believed, secondly, the action he took, acting on that belief, and third, the felonious appropriation of the goods when obtained by her to her own use. The so-called entrusting of the jewels to her, furnished to her – as she intended it should – the opportunity for and means of committing the theft.

[15] As regards the application of the provision of Clause 8 of the General Exceptions to the Insurance Policy relating to the offence of cheating in the present case, we are of the view that an exception clause is not operative unless if the events leading to the loss of the motor vehicle can be regarded as the proximate cause of the loss or the inevitable cause of the loss. (See *The Law of Insurance Contracts* (4th edn 2002) by Malcolm A Clarke para 19-1C2 at p. 583). On this point we also refer to the case of *Reischer v. Borwick* [1894] 2 LR 548 wherein on the facts of the case the insurance policy covered "only against the risk of collision (as per clause attached), and damage received in collision with any object, including ice". The clause attached related to collision with other vessels and the policy did not include "perils of the sea". It was decided by Lindley LJ at p. 551 that:

> ... The sinking of this ship was proximately caused by the internal injuries produced by the collision, and by water reaching and getting through the injured parts whilst she was being towed to a place of repair. The sinking was due as much to one of these causes as to the other, each was as much a proximate cause of her sinking as the other, and it would, in my opinion, be contrary to good sense to hold that the damage by the sinking was not covered by this policy.

In the present case the proximate cause of the loss or the inevitable cause of the loss of the motorcar is in fact due to the act of theft by the said customer and not cheating.

[16] Back home, we would like to cite two case authorities and highlight the issue raised in the present appeal as to whether the events leading to the loss of the motor vehicle falls within the definition of theft in order to qualify for a claim under the insurance policy or it falls under the exception clause to exclude liability. In both these cases our courts found that based on the factual circumstances of the case the loss of the motor vehicle was a result of theft and that it does not fall within the definition of any other specified offence under the exception clauses of the insurance policy.

[17] In the first case of *Taisho Marine and Fire Insurance (M) Sdn Bhd v. Secure Guards Sdn Bhd* [2001] 1 AMR 657, the plaintiff's claim against the defendant was the amount payable under a policy of insurance issued by the defendant in respect of the plaintiff's motor-van ("the vehicle"). The vehicle was last used by an employee of the plaintiff who failed to return the same to the plaintiff or report back for duty. A police report was lodged by the plaintiff to the effect that the vehicle was missing and suspected to have been stolen. The defendant sought to exclude its liability pursuant to clause (iv) of the "Exception to Section 1" (the exception clause) of the policy, on the ground that it was not responsible for the loss of the vehicle which it contended, had resulted from the breach of trust by the plaintiff's employee. The issue for determination was whether the loss incurred by the plaintiff was due to theft which entitled the plaintiff to make the claim under the policy or criminal breach of trust which excluded the defendant's liability. KC Vohrah J, (as he then was) at p. 664 stated:

> The court may presume having regard to human conduct that when the servant did not return that day with the van or at all to the plaintiff's premises he had dishonestly run away with it taking also into account that the salaries of the employees which he had to pay to them were never paid to the employees. In the context of section 378, Illustration (d) read with section 27 of the Penal Code, the servant had dishonestly taken the van out of the plaintiff's possession without the plaintiff's consent.
>
> Thus the loss of the motor-van was due to theft committed by the security guard. If the security guard was not a servant Illustration (d) would have fitted the case as the security guard would not have had possession of the van and therefore the plaintiff did not have possession of it and theft could not have been committed of the van but there probably was criminal breach of trust.

[18] In the second case of *Hong Leong Assurance Bhd v. Teoh Seow Chiew* [2004] 8 CLJ 247, the Sessions Court and the High Court on appeal had to determine whether the loss of the motorcar was due to "theft" or "cheating". The plaintiff was the owner of the motorcar and the defendant was an insurance company. The plaintiff had sent the motorcar to a Petronas Wash to be washed and vaccumed. He surrendered the motorcar and the keys to the owner of the car wash and left the premises. After about an hour, the owner returned to collect the motorcar but was told that a Malay man had taken the motorcar. Raus Sharif J (as he then was) upheld the finding of the trial judge that the loss was due to theft and not cheating.

[19] The learned trial judge of the High Court also found that the plaintiff had been negligent in failing to take reasonable steps to safeguard the motorcar from the loss and for this reason the plaintiff is not entitled to make the claim under the insurance policy. On this issue we agree with the finding of the Court of Appeal that from the facts of the case there is not a single element to show that the plaintiff's sales representative was deliberately courting danger. We are of the view he was deceived into leaving the car with a view to oblige the said customer as a potential buyer. No reasonable man would have foreseen that such a potential buyer who had portrayed himself as a man of some standing in society would have acted in such a manner. In the circumstances of this case it is our judgment that the plaintiff had not acted recklessly. At any rate on this issue we could not find anywhere in the insurance policy that the act of negligence on the part of the insured is provided for as an exclusion clause to defeat the claim made by the insured.

[20] In conclusion we would state here that since we have affirmed the finding of the Court of Appeal that the loss is due to theft and not cheating, there is therefore no conflict between the relevant provisions of the insurance clauses for our determination. The questions posed in this appeal are now purely academic. For completeness we would nevertheless answer the questions posed by stating that the court ought not to interpret the clauses of the insurance policy which would result in the insured losing the benefits of the coverage what it appears to have granted under the coverage clause by applying the exclusion clause to exclude

liability. Therefore, questions (a) and (b) are answered in the affirmative. Since the Exclusion Clause 8 of the Insurance policy relating to offence of cheating does not apply in this case there is no necessity for us to answer question (c).

[21] For the reasons abovestated we dismiss with costs the appeal by the defendant. We award a sum of RM30,000 as costs to the plaintiff. Deposit to the plaintiff towards costs.